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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 21

[Docket No. FWS-R9-MB-2011-0060]

[91200-1231-9BPP]

RIN 1018-AX90

Migratory Bird Permits; Definition of “Hybrid” Migratory Bird

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise the definition of “hybrid” as it relates to birds protected under the Migratory Bird Treaty Act. At present, the definition applies only to hybrids of two species on the list of migratory birds at 50 CFR 10.13. We propose to revise the definition to make it clear that it applies to the offspring of any species listed at 50 CFR 10.13.

DATES: Send comments on this proposal by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments by either one of the following two methods:

- *Federal eRulemaking portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on Docket FWS–R9–MB–2011–0060.
- *U.S. mail or hand delivery:* Public Comments Processing, Attention: FWS–R9–MB–2011–0060; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 North Fairfax Drive, MS 2042–PDM; Arlington, VA 22203–1610.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information that you provide. See the **Public Comments** section below for more information.

FOR FURTHER INFORMATION CONTACT: Dr. George T. Allen at 703-358-1825.

SUPPLEMENTARY INFORMATION:

Background

At present, at 50 CFR 21.3, the term “hybrid” is defined as the “offspring of birds listed as two or more distinct species in §10.13 of subchapter B of this chapter, or offspring of birds recognized by ornithological authorities as two or more distinct species listed in §10.13 of subchapter B of this chapter.” This means that, under the definition of “hybrid” birds at 50 CFR 21.3, the only hybrid migratory birds that are protected by our regulations under the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703-712) are birds that are the offspring of two species already protected under the MBTA.

This definition has created difficulties because it differs from the longstanding Service application of “hybrid” to falconry and raptor propagation birds, in particular.

“Hybrid” was not defined prior to 2008, when the falconry regulations were substantially revised (73 FR 59448-59477, October 8, 2008). We defined “hybrid” in 50 CFR 21.3 in a manner that conflicts with the use of the term in other regulations.

To ensure that all appropriate hybrid migratory birds receive protection under our regulations implementing the MBTA, we are proposing a change to the definition of “hybrid.” The proposed definition change would make it clear that the offspring of any species listed at 50 CFR 10.13 is protected under the MBTA, regardless of how many generations that bird is removed from the wild. The proposed definition would also be consistent with the definition of “migratory bird” at 50 CFR 10.12, and with the definition of “hybrid” at 50 CFR 23.5 of the regulations implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The definition of “migratory bird” in 50 CFR 10.12 is: “Migratory bird means *any bird, whatever its origin* and whether or not raised in captivity, which belongs to a species listed in §10.13 or which is a mutation *or a hybrid of any such species. . .*” (emphasis added). Likewise, the definition at 50 CFR 23.5 is “*Hybrid* means any wildlife or plant that results from a cross of genetic material between two separate taxa *when one or both are listed. . .*” (emphasis in original and added, respectively).

The proposed definition would also be consistent with the purpose of the MBTA (16 USC 701): The object and purpose of this Act is to aid in the restoration of such birds in those parts of the United States adapted thereto where the same have become scarce or extinct, *and also to regulate the introduction of American or foreign birds* or animals in localities where they have not heretofore existed (emphasis added). If hybrid raptors, with one foreign parent (not listed on §10.13), could not be regulated under the MBTA, then

these introduced birds could potentially pose a threat to native birds by, for example, competition or cross-breeding. The Service has recognized that threat in its regulations, explicitly prohibiting several times the release of hybrid raptors in the wild at 50 CFR 21.29 (b)(6)(v), (b)(12), (e)(9)(i), and (e)(9)(iv). If the Service did not have authority under the MBTA to regulate hybrids, then it would have no authority over release of hybrids under 50 CFR 21.29. The proposed definition change would thus harmonize with the Service's existing authority and regulation.

Similarly, if the Service did not have authority to regulate hybrids in which one parent was not listed on §10.13, then it would have no authority to regulate hybrids with a "prohibited raptor." In the 2008 revisions of the falconry regulations, the Service recently allowed possession of hybrids (50 CFR 21.29(c)(3)(i)(E)), except for hybrids of certain species: "You may possess a raptor of any Falconiform or Strigiform species, including wild, captive-bred, *or hybrid individuals, except a federally listed threatened or endangered species, a bald eagle (*Haliaeetus leucocephalus*), a white-tailed eagle (*Haliaeetus albicilla*), a Steller's sea-eagle (*Haliaeetus pelagicus*), or a golden eagle (*Aquila chrysaetos*)*" (emphasis added). Under the current definition, the Service would not have MBTA authority with a hybrid of a foreign non-§10.13 listed raptor and a "prohibited raptor," a conflict with this regulation. Again, the proposed definition change would harmonize with 50 CFR 21.29.

Lastly, the change is consistent with the Service's broad interpretation of hybrid species. As early as 1983 (48 FR 31600, July 8, 1983), the Service recognized that CITES and the MBTA cover hybrid species. The Service responded to comments that hybrids birds (and captive-bred birds) are not included within the terms of the MBTA,

and the commenters implied that coverage of such birds in such regulations is an unlawful expansion of the MBTA. However, regulations governing captive-bred birds have been held to be within the Secretary's authority under the MBTA (*U.S. v. Richards*, 583 F.2d 491, 10th Cir. 1978). The court upheld the regulations on the basis that MBTA enforcement would be hindered if the defense was available that a bird involved, in this case a captive-bred falcon, was raised in captivity. In view of this decision, and the Supreme Court's expansive reading of the MBTA in *Andrus v. Allard*, 444 U.S. 51 (1979), the Service believes the coverage of hybrids is similarly within the Secretary's broad authority under the MBTA. Later in 1998, the Service interpreted migratory bird broadly at 50 C.F.R. § 10.12 (1998) as "whatever its origin, whether or not raised in captivity." Such a definition continues the broad interpretation of hybrid species, as the MBTA applies to migratory birds, "whatever its origins." Only in the 2008 falconry regulations revisions did the Service amend the definition of hybrid species to both parents on §10.13. The proposed change returns the definition of hybrid to its earlier meaning, makes the Service's regulations consistent with its practices, as the Service's Office of Law Enforcement has treated hybrids as protected, in compliance with CITES. Hybrid raptors may be exceptionally difficult to identify, and without a regulation making it clear that hybrids raptors are protected under the MBTA as they are under CITES, the work of wildlife law enforcement and border inspectors would be more subjective and more difficult.

Public Comments

We request comments on this proposed rule. You may submit your comments and supporting materials by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax, or written comments sent to an address other than the one listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request that we withhold this information from public review, but we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection at <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service (contact the person listed under **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this proposed rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria.

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (Pub. L. 104-121)), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule would not have a significant economic impact on a substantial number of small entities.

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide the statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities. If adopted, there would be no costs associated with this proposed regulation change because the Service's Office of Law Enforcement has treated hybrids as protected, as is consistent with CITES. We have determined that because this proposed regulation change would not have a

significant economic impact on a substantial number of small entities, so a regulatory flexibility analysis is not required.

This rule is not a major rule under the SBREFA (5 U.S.C. 804 (2)). It would not have a significant impact on a substantial number of small entities.

a. This rule would not have an annual effect on the economy of \$100 million or more.

b. This rule would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, Tribal, or local government agencies, or geographic regions.

c. This rule would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we have determined the following:

a. This rule would not affect small governments. A small government agency plan is not required. Amending the definition of “hybrid” at 50 CFR 21.3 would not affect small government activities.

b. This rule would not produce a Federal mandate of \$100 million or greater in any year. This proposal is not a significant regulatory action.

Takings

This proposed rule does not contain a provision for taking of private property. In accordance with Executive Order 12630, a takings implication assessment is not required.

Federalism

This rule does not have sufficient Federalism effects to warrant preparation of a Federalism assessment under Executive Order 13132. It would not interfere with the States' abilities to manage themselves or their funds. No significant economic impacts are expected to result from the proposed change in the definition of "hybrid" at 50 CFR 21.3.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act of 1995

This proposed rule does not contain any new information collections or recordkeeping requirements for which approval from the Office of Management and Budget (OMB) is required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed this proposed rule in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. 432-437(f), and Part 516 of the U.S. Department of the Interior Manual (516 DM). The proposed regulation change would have no environmental impact.

Socioeconomic. The proposed regulation change would have no discernible socioeconomic impacts.

Migratory bird populations. The proposed regulation change would not affect native migratory bird populations.

Endangered and threatened species. The proposed regulation change would not affect endangered or threatened species or habitats important to them.

Government-to-Government Relationship with Tribes

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), Executive Order 13175, and 512 DM 2, we have determined that there are no potential effects on Federally recognized Indian Tribes from the proposed regulation change. The proposed regulation change would not interfere with Tribes’ abilities to manage themselves or their funds, or to regulate migratory bird activities on tribal lands.

Energy Supply, Distribution, or Use (Executive Order 13211)

This proposed rule would not affect energy supplies, distribution, or use. This action would not be a significant energy action, and no Statement of Energy Effects is required.

Compliance with Endangered Species Act Requirements

Section 7 of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that “The Secretary [of the Interior] shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter” (16 U.S.C. 1536 (a) (1)). It further states that the Secretary must “insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued

existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat” (16 U.S.C. 1536 (a) (2)). The proposed regulation change would not affect listed species.

Clarity of this Regulation

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

List of Subjects in 50 CFR Part 21

Exports, Hunting, Imports, Reporting and recordkeeping requirements,
Transportation, Wildlife.

Proposed Regulation Promulgation

For the reasons described in the preamble, we propose to amend subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 21— MIGRATORY BIRD PERMITS

1. The authority for part 21 continues to read as follows:

Authority: Migratory Bird Treaty Act, 40 Stat. 755 (16 U.S.C. 703); Public Law 95-616, 92 Stat. 3112 (16 U.S.C. 712(2)); Public Law 106-108, 113 Stat. 1491, Note following 16 U.S.C. 703.

2. Amend §21.3 by revising the definition of “hybrid” to read as follows:

§21.3 Definitions.

* * * * *

Hybrid means offspring of any two different species listed in §10.13 of subchapter B of this chapter, and any progeny of those birds; or offspring of any bird of a species listed in §10.13 of subchapter B of this chapter and any bird of a species not listed in §10.13 of subchapter B of this chapter, and any progeny of those birds.

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Dated: October 28, 2011

Michael J. Bean

Acting Assistant Secretary for Fish and Wildlife and Parks.

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